

1 MR. SCHONMAN: Yes, Your Honor, in all fairness I
2 think that intent is a critical element of the, of the issues
3 in this case in that Ms. Duff's state of mind is of some
4 import as to disposition of those issues. I think I would
5 agree with Mr. Cohen to the extent that the first clause of
6 that last sentence should be stricken, that is, "NMTV has a
7 functioning minority-controlled board of directors and -- "
8 and up to the word "and," strike that and, and retain that,
9 that last portion, "I at all times have considered NMTV to be
10 a minority-controlled company." Going to state of mind.

11 JUDGE CHACHKIN: Solely going to her state of mind.

12 MR. SCHONMAN: Correct.

13 MR. COHEN: Your Honor, before you rule, and I, I, I
14 think I can anticipate your ruling, I wanted to ask you to
15 consider one point, and that is --

16 JUDGE CHACHKIN: It doesn't go to the truth of the
17 matter. It's only a state of mind.

18 MR. COHEN: Well, I was going to say the first issue
19 in my judgment has no bearing upon intent and I think that if
20 you permit this in because of, of the witness's intent being
21 significant, at the outset I, I would hope you would rule
22 that, that intent only relates to issue B but there is no
23 necessity to prove intent insofar as issue A is concerned.

24 JUDGE CHACHKIN: You're correct, Mr. Cohen.

25 MR. TOPEL: Your Honor, may I speak to that? I

1 don't --

2 JUDGE CHACHKIN: Yes.

3 MR. TOPEL: -- I don't think that's correct at least
4 in term of sanction and penalty. This is a proceeding that
5 has disqualifying issues, there's also a forfeiture issue, and
6 in determining whether or not a licensee should be
7 disqualified or determining the amount of a forfeiture or
8 whether any forfeiture should be, should be issued, the, the
9 good faith and intent of the applicant is highly relevant.
10 It's stated in the Commission character policy statement, it's
11 stated in numerous cases. So, I think intent is, is extremely
12 relevant to go to sanction and, and to go to mitigation and
13 what you do with the factual record that you get. I don't
14 think the limitation that Mr. Cohen suggested is, is proper at
15 all.

16 JUDGE CHACHKIN: You, you would, you would agree
17 then that intent does not go -- intent is not relevant to the
18 question of whether it was *de facto* controlled? You wouldn't
19 argue with that? You're arguing that in determining the
20 ultimate sanction assuming the facts established that there
21 was *de facto* control that you should be able to show -- this
22 evidence would go to the question of intent in determining the
23 sanction?

24 MR. TOPEL: Yes, Your Honor.

25 JUDGE CHACHKIN: Solely for that purpose?

1 MR. COHEN: That's not -- well, I'll -- I'm not, I'm
2 not so sure I agree, but certainly for purposes of your ruling
3 you could make that tentative decision. But the, the key is
4 that in determining issue A intent does not obtain.

5 JUDGE CHACHKIN: Well, in determining the issue C,
6 determining the, the ultimate issue -- intent would be a
7 factor if it was done mistakenly or if it was done
8 intentionally.

9 MR. COHEN: Well, I agree that -- issue B, I agree
10 that the abuse of process issue as Mr. Schonman indicates
11 engulfs or contains intent so to that extent I agree with
12 that, Your Honor. But I, but I want the record to be clear
13 that I don't think that intent is a basis -- put it this way.
14 I don't believe, this is assuming *arguendo* that my friend Mr.
15 Topel who is an eloquent lawyer can persuade you that because
16 NMTV, TBN didn't intend to exercise *de facto* control, that *de*
17 *facto* control didn't occur.

18 JUDGE CHACHKIN: Well, that's been conceded. The
19 question is resolving C, D and E, the conclusory issues and
20 whether the forfeiture is warranted --

21 MR. COHEN: Well, those are --

22 JUDGE CHACHKIN: -- under A and B whether or not
23 it's relevant to consider intent.

24 MR. COHEN: Well, the forfeiture is not -- as I have
25 the issue in front of me, I don't see the forfeiture as, as

1 one of the designated issues. So, I -- am I reading this
2 wrong, Your Honor? I read there, I read there to be --
3 I read --

4 JUDGE CHACHKIN: Sure, it deals with transfer of
5 control, the forfeiture, paragraph 52.

6 MR. COHEN: Well, I was looking at -- you know, what
7 I was looking at was the issues, Your Honor, when I read that.

8 JUDGE CHACHKIN: I understand, but paragraph 52
9 deals with the forfeiture.

10 MR. COHEN: Okay. Could I, could I, could I have a
11 moment to read paragraph 52?

12 JUDGE CHACHKIN: Yes.

13 MR. COHEN: I hadn't, I hadn't focused on that. And
14 what was the question you put to me, Your Honor?

15 JUDGE CHACHKIN: The question is, doesn't the
16 intent, whether it was done deliberately or done mistakenly, a
17 factor to be considered in determining the nature of the
18 forfeiture?

19 MR. COHEN: Yes, but that wouldn't -- I agree with
20 that, Your Honor, but that would not go to determine whether
21 the application should be granted. It would go -- that, that
22 intent would go as, as 52 talks in terms of what the
23 forfeiture -- I do agree with that.

24 JUDGE CHACHKIN: And also, wouldn't intent be a
25 factor considering what the ultimate resolution of this case

1 is?

2 MR. COHEN: It does to the extent that issue B calls
3 for, calls for a determination of the, of the applicant's --
4 or the parties' --

5 JUDGE CHACHKIN: Well, isn't intent also a factor to
6 be considered in assuming that *de facto* control has been
7 established?

8 MR. COHEN: No, I don't agree with that. I think if
9 you, if you, if you have concluded on the record that *de facto*
10 control has been established --

11 JUDGE CHACHKIN: Do you have to take away the
12 license -- without regard of the circumstances, the
13 mitigation?

14 MR. COHEN: Oh, absolutely, and, and I, and I
15 believe -- yes, I believe so. And, and without, without
16 reference to the, to the -- also without reference to the
17 program. There's precedent on that.

18 JUDGE CHACHKIN: Well, we're not dealing with
19 program issues. We're dealing with these issues.

20 MR. COHEN: I'm -- but -- no, I'm saying you
21 wouldn't even have to consider the programming. You could say
22 -- you could -- there's, there's --

23 JUDGE CHACHKIN: Well, I'm not arguing that, I'm not
24 arguing that -- anything about the renewal expectancy or
25 whether the programming is a factor to be considered. I'm

1 | arguing about -- based on, on these issues alone.

2 | MR. COHEN: I would say, and this is a worst-case
3 | scenario for my client, that we prove the issue -- that
4 | issue A is proved to your satisfaction that *de facto* control
5 | is exercised but that you decided that the abuse of process
6 | issue -- that they didn't abuse the Commission's processes,
7 | that the license should still not be renewed because issue A
8 | is a disqualifying issue.

9 | MR. TOPEL: Well, Your Honor, that's clearly wrong.
10 | There are numerous Commission cases where *de facto* control has
11 | been, has been found and no disqualification resulted.

12 | JUDGE CHACHKIN: All right. First clause, NMTV has
13 | a functioning minority-controlled board of directors will be
14 | rejected and the word "and" will also be rejected. And
15 | beginning with the sentence, "I at all times have considered
16 | NMTV to be a minority-controlled company," we'll proceed
17 | solely on the question of intent, not to the truth of the
18 | matter to be considered.

19 | MR. COHEN: Your Honor, should I, should I go on?

20 | JUDGE CHACHKIN: Yes.

21 | MR. COHEN: There's a fundamental issue that comes
22 | up in this paragraph, paragraph 5, that I haven't mentioned
23 | that --

24 | JUDGE CHACHKIN: What is that?

25 | MR. COHEN: -- I want to bring to your attention.

1 Throughout this exhibit, and I will -- I'm prepared to mention
2 each point specifically, there is a -- there is much text
3 about employing, training and promoting minorities and I
4 submit to you that that matter is absolutely collateral to the
5 designated issues. That has nothing to do with the designated
6 issues. That is a matter which may be indeed relevant in a
7 license renewal proceeding for NMTV, but it doesn't have --
8 it's not relevant to determining issue A and B.

9 MR. TOPEL: Your Honor?

10 JUDGE CHACHKIN: Yes? How is that relevant to
11 issues A and B?

12 MR. TOPEL: I think the statement is wrong. The,
13 the issue designated was whether National Minority Television
14 was established in good faith as a minority-controlled
15 organization and then represented to the Commission both for
16 minority preferences and to, to own some full-power stations.
17 The Commission's purposes in having these minority ownership
18 policies that are at issue in this case is to create
19 employment opportunities, to create programming, so that the
20 minority community will be served and I can cite you precedent
21 on, on that, but I, I don't think that's a point that's in
22 much dispute. The fact that this entity proceeded to do what
23 the Commission policies were set out to do is very relevant
24 factually to the inferences that you would draw about the
25 applicant's intent. Our position very simply is that, that

1 the Commission policy has been utilized exactly the way it was
2 supposed to be utilized. A minority company was set up, it
3 went out, it bought stations, it hires minority employees, it
4 does minority programming, that this is legitimate from A to
5 Z. And I think to, to not allow the applicant who's accused
6 of being a phony minority company and having abused the
7 Commission's rules to show that it did exactly what the rules
8 were set up to have happen would be erroneous. It's, it's
9 certainly relevant. It -- there's testimony about the intent
10 of the applicant or National Minority Television when it was
11 set up, and then there's evidence that, that they -- how they
12 proceeded to follow that intent which, which establishes in
13 our view the *bona fides* of the intent.

14 JUDGE CHACHKIN: Well, couldn't it be equally true
15 that supposedly there weren't any participations of minorities
16 on the board and nevertheless they did what is reflected here.
17 Would that change the factor of whether it was minority
18 controlled or not? I mean, I don't understand, whether the,
19 the personnel or the practices they followed has anything to
20 do with controlled the corporation.

21 MR. COHEN: Exactly, and that's the --

22 MR. TOPEL: It goes to their intent, Your Honor.

23 JUDGE CHACHKIN: How does it go to their intent?
24 How does, how does -- what is -- how does it deal with
25 minority control? Practices they followed -- tell me how that

1 relates to minority control.

2 MR. TOPEL: Well, Your Honor, let me read from the
3 "Metro" Supreme Court decision which talks about the reasons
4 for these minority-ownership rules.

5 JUDGE CHACHKIN: I, I -- that, that's irrelevant
6 what the reasons are. The fact of the matter is, was it
7 minority controlled or not. That's, that's -- whether it
8 accomplished the objectives that the Commission wanted it to
9 accomplish but did so in a way contrary to, to 310(b) is
10 irrelevant. Was it -- does it, does it meet the standards of
11 310(b), or was, was -- in other words, was there a transfer of
12 control or and was there not a transfer of control? And the
13 fact the programming they carried or the employees or all the
14 rest has no bearing on whether or not there was a transfer of
15 control.

16 MR. TOPEL: Your Honor, the issue again goes, goes
17 to intent. There is precedent --

18 JUDGE CHACHKIN: I don't see how intent has anything
19 to do with the practices they follow. Intent may have a
20 bearing like you say whether it was -- she considered it to be
21 a minority-controlled company, but it doesn't become a
22 minority-controlled company by the practices that the company
23 followed or by the employees they hired or the programming
24 that they had. That has no bearing on whether or not it's
25 minority controlled or not. And that's the issue, whether it

1 was de facto controlled.

2 MR. TOPEL: Well, the issue is --

3 JUDGE CHACHKIN: Who made the decisions. Not the
4 practices that were followed, but who made the decisions. And
5 if the decisions were made by an all-white board,
6 notwithstanding that the decisions fully consisted with the
7 Commission's goal in establishing minority-control it would be
8 irrelevant.

9 MR. TOPEL: Well, this evidence shows what the
10 decisions were, and, and, and --

11 JUDGE CHACHKIN: I'm, I'm only interested in who
12 made the decisions, not what the decisions were. That's the
13 determination of control, who controls the corporation, who
14 made the decisions. The nature of the decisions is irrelevant
15 to the question of control.

16 MR. TOPEL: Well, I would submit, Your Honor, that
17 if as there is ample testimony the -- that the corporation was
18 formed with the intention of giving opportunities to
19 minorities, you may be right that if they then did not do
20 that, that may not undercut the intent. But the fact that
21 they did go forward and do it and produced precisely what the
22 policy wanted does demonstrate that the intent was created in
23 good faith.

24 JUDGE CHACHKIN: The fact that it was a benevolent
25 white corporation has on bearing on whether there was control

1 or not. The question of control is who, who was -- who, who
2 reported to the -- who represented to the Commission would be
3 in control of the corporation. And if it was a benevolent
4 white corporation did everything the Commission wanted them to
5 do in establishing the policy is irrelevant to the question of
6 control. The only question bearing on control is who made the
7 decisions. That's the only question. The nature of the
8 decision is totally irrelevant to the question of control.
9 Yes, Mr. Honig?

10 MR. HONIG: I'd like to be heard. There are three
11 reasons why I, I would reach the same tentative conclusion
12 that Your Honor has just articulated in addition to those Your
13 Honor has just articulated. The "Metro Broadcasting" case to
14 which my colleague Mr. Topel has referred found a basis for
15 the minority ownership policy through among other things
16 reviewing various research studies which found that in
17 general, macrocosmically, minority-controlled stations tend to
18 be more responsive to minority community needs and tend to
19 hire more minorities than similarly-situated nonminority
20 stations. I did one of those studies that the court relied on
21 in making that finding. But that was a finding that related
22 to causation and it was a macrocosmic finding. I don't think
23 it would be accurate to rule in a microcosm of a particular
24 station and that that reasoning must necessarily be followed
25 in all events, the court didn't say that it must be followed

1 in all events, it said that only that this is a prediction of
2 why the policy is macrocosmically justified. Nor would it be
3 correct to reason from -- to reason conversely in the other
4 direction that because a company tends to hire minorities or
5 tends to produce programming responsive to minorities, that it
6 follows that you could infer anything about its ownership.
7 Group W is well known as a company that holds itself out
8 correctly as having programming responsive to minorities that
9 it produces and it hires a lot of minorities, but you could
10 draw no inference whatsoever about the composition of
11 Group W's board of directors or the role of minorities in
12 Group W by reasoning in that direction. And the reason is
13 that there is more than one factor, more than one source, more
14 than one policy, which could explain and ought to explain the
15 hiring practices of a company or their programming. For
16 example, since 1969 the Commission has had an EEO rule which
17 when it was adopted was adopted for the -- with, with the
18 thought that all licensees regardless of the composition of
19 their ownership would be expected to hire minorities and the,
20 the nexus with, with, with programming would thus be, be
21 addressed in a manner which didn't offend Section 326. That
22 nexus was, was upheld by the Supreme Court in "NAACP v.
23 Federal Power Commission", 425 U.S. 662 670 note 7. Because
24 you can't distinguish conversely and for an individual case
25 microcosmically the source of the nexus of their -- of, of, of

1 what they do, this type of evidence is, is not competent, it's
2 not adequate. I make one final point. The -- even if you
3 assume for the sake of argument that you could derive some
4 inference about who controlled the company from their
5 practices, the relevant test here would be what's the custom
6 in the Miami market, are they doing more than the other 11
7 television stations in that market. There is no evidence
8 presented whatsoever that showed that what they're doing is
9 more or less responsive than any of the other stations. If
10 this is going to be allowed in, I think it would be necessary
11 to allow S.A.L.A.D. to present rebuttal evidence which will
12 show that they in fact do considerably less than the average
13 station in Miami. And forgive me for being so long-winded.

14 JUDGE CHACKIN: All I want to say is there are a
15 number of cases dealing with transfer of control, we're not
16 dealing with a novel issue. And all the cases deal with who
17 made the decisions on programming, who made the decisions --
18 in fact, the designation order itself sets forth what, what
19 the determinants are in determining whether to transfer
20 control. And the fact of the matter is that the programming
21 which was produced was beneficial for minorities or practices
22 are beneficial to minorities has no bearing on who made these
23 decisions. That's the determinant. I think the designation
24 order itself talks about the factors to be considered under
25 transfer of control.

1 MR. COHEN: It lays them out, Your Honor.

2 JUDGE CHACHKIN: It lays them out, that's right.

3 And I am not aware of anywhere where the Commission said the
4 basis of determining *de facto* control is the programming which
5 was carried. Here, the programming was carried with minority.
6 *Ipso facto*, the, the corporation was controlled by minorities.
7 That's not a valid inference at all. You can have stations
8 which are controlled by minorities which don't have minority
9 programming, and vice versa. So, what, what -- that has no
10 bearing on the question of *de facto* control.

11 MR. TOPEL: Your Honor, first of all, the, the
12 designation order does attack this licensee based on the
13 content of the programming, saying it's programming of all one
14 kind. And they draw an inference -- the designation order
15 seems to draw some inference from that although there was no
16 evidence about who made the decision.

17 JUDGE CHACHKIN: Where, where are you referring --
18 where are you referring to?

19 MR. TOPEL: Paragraph 34.

20 JUDGE CHACHKIN: Paragraph 34? And what does it say
21 there? There is also evidence that TBN controls NMTV's
22 programming.

23 MR. TOPEL: Because the programming is all network
24 programming. Now --

25 JUDGE CHACHKIN: And because it comes from NMTV --

1 MR. TOPEL: Right.

2 JUDGE CHACHKIN: -- which I assume is a white-
3 controlled organization.

4 MR. TOPEL: No, Your Honor, that --

5 JUDGE CHACHKIN: Well, we'll find out from the
6 facts. I don't know.

7 MR. TOPEL: Well, Your Honor, I don't -- how can we
8 make that assumption?

9 JUDGE CHACHKIN: The point of the matter is what
10 they're saying is these are individual licensees and the fact
11 that they're getting programming from another source, it's not
12 being -- decision -- programming decisions appear not to be
13 made by the local station is an indicia of whether the local
14 station purported -- who were purportedly in control are in
15 fact in control. That's all they're saying there.

16 MR. TOPEL: Your Honor, the testimony that we have
17 offered is not in the abstract and I think this objection is
18 sort of made as a generic objection and the testimony that we
19 have offered relates to -- it goes back to the history of the
20 company. Who hired the general manager, how he was hired, why
21 he was selected, what he was selected to do. And then is that
22 persuasive or credible or not? Well, he did it so, of course,
23 yes, it is persuasive and credible.

24 JUDGE CHACHKIN: What, what is persuasive and
25 credible? I agree with you that who hired the general manager

1 is certainly a factor to be considered.

2 MR. COHEN: I have no objection to that --

3 JUDGE CHACHKIN: That certainly is a relevant factor
4 in determining control.

5 MR. TOPEL: And that the --

6 JUDGE CHACHKIN: But the fact that the general
7 manager put on a certain kind of programming is not relevant
8 to the question of control --

9 MR. TOPEL: Well, it --

10 JUDGE CHACHKIN: -- unless he was directed to do so
11 by the board.

12 MR. TOPEL: Well, that --

13 JUDGE CHACHKIN: And the board was made up of a
14 minority.

15 MR. TOPEL: That's the case, Your Honor.

16 JUDGE CHACHKIN: Well, we'll have to find out that.
17 But it has nothing to do with the programming that per se that
18 it was carried. I think the Commission has laid out pretty
19 clearly the factors which are relevant to a transfer of
20 control issue and unless you could show me other precedent
21 which supports your theory that the actual practice of the
22 station have a bearing on whether or not who controlled the
23 corporation, in this case whether it was minority controlled
24 or not, I'm not going to permit testimony of this nature.

25 MR. TOPEL: Well, Your Honor, isn't -- I'm, I'm

1 reluctant, Your Honor, because I don't want to be perceived
2 as, as arguing with the presiding judge and obviously you --

3 JUDGE CHACHKIN: I have no objection to that.

4 MR. TOPEL: -- obviously you know, you know to cut
5 me, you know, you know to cut me off and I don't want the, the
6 record to reflect any disrespect at all on my part. But, Your
7 Honor, the designation order that we just read talked about
8 the programming of the station and drew an inference from that
9 it was the wrong kind of programming, it was TBN programming.

10 JUDGE CHACHKIN: No, it drew an inference from the
11 source of the programming. That's what they're talking about,
12 the source of the programming, not the --

13 MR. COHEN: Control -- the control of the
14 programming is what the Commission is concerned about, Your
15 Honor. The control was coming from TBN, that's the context in
16 which the Commission discussed this. It wasn't programming --
17 they were pointing out the similarities between NMTV and TBN
18 and I have no objection, Your Honor, whatsoever to Mrs. Duff
19 or, or anyone else talking about the differences between NMTV
20 and TBN. That I think is fair game, and you should make a
21 judgment. But that's not -- but that should be in specific
22 terms as you, as you indicated on who's making the decision.

23 MR. TOPEL: But, Your Honor, it is, and that's what
24 Mr. Cohen is objecting to. We offered evidence that said we
25 do have some other programming and it was planned from the

1 beginning of the organization. There were some problems
2 getting a studio built, but there's multiple testimony that it
3 was planned from the beginning, and it happened. And it's not
4 what TBN is doing. And it was determine by the board of
5 directors, Pastor E.B. Hill and Jane Duff and Pastor Espinoza
6 when he was on the board. And there is an intent here that
7 this company is not dominated by Trinity Broadcasting Network
8 and we did programming that proves that and that's what Mr.
9 Cohen is objecting to now in a very generic way. I mean, I
10 have to say I'm not sure even what words Mr. Cohen has
11 objected to so --

12 MR. COHEN: I'll tell you exactly what I'm objecting
13 --

14 MR. TOPEL: -- we're having a philosophical debate
15 --

16 JUDGE CHACHKIN: I don't think it's a philosophical
17 debate.

18 MR. COHEN: I'm objecting, Your Honor, to the
19 sentence, "NMTV's minority-controlled board has made a strong
20 commitment to employing, training and promoting minorities, to
21 initiating outreach to the minority community and to producing
22 local minority programming all of which are now being realized
23 at our Portland station." It's not, it's not theoretical,
24 it's very specific.

25 MR. TOPEL: And it's not TBN, it's a difference

1 between TBN network programming.

2 JUDGE CHACHKIN: If you want to show the differences
3 then put on programs -- demonstrate the programs which, which
4 were carried by -- which TBN -- not which TBN, which the local
5 stations put on on their own.

6 MR. COHEN: Your Honor --

7 MR. TOPEL: They're, they're --

8 MR. COHEN: Your Honor --

9 MR. TOPEL: -- they're in there. Mr. McQuellen's
10 testimony.

11 MR. COHEN: It's not sufficient as NMTV has done in
12 order to make the argument that you're, you're going to permit
13 to just show the NMTV programming. They have to show it's
14 different from Trinity programming.

15 JUDGE CHACHKIN: Well --

16 MR. COHEN: Just to show what goes on in the
17 Portland station is absolutely irrelevant unless they, unless
18 they had a foundation laid as to how that's different from
19 what's in the Trinity stations. Otherwise, it's irrelevant
20 because the Commission's order talks about the similarities
21 between NMTV and TBN so programming qua programming as to
22 what's broadcast over NMTV has no relevance whatsoever unless
23 there's first a foundation shown to you, Your Honor, that this
24 programming is different from Trinity programming. And I
25 submit to you there's not any such foundation in these -- in

1 | this two volumes or four volumes or six volumes of testimony.

2 | MR. TOPEL: Well, there certainly is. Mr. McQuellen
3 | has testified about local production activities that are
4 | conducted in Portland that he implemented to be local programs
5 | to serve the Portland community. It's, it's very clearly
6 | spelled out. Now, one last comment just for Mr. Honig's
7 | benefit because he has his hand up. Mr. Honig was commenting
8 | about Miami, that's the renewal expectancy part of the case.
9 | This issue doesn't concern Miami.

10 | MR. HONIG: Counsel is correct. I meant to say
11 | Portland and I'm sorry. Your Honor, I would, I would go one
12 | step farther actually than, than Mr. Cohen has gone. Suppose
13 | a company hypothetically created another entity to get a
14 | thirteenth and fourteenth station that it otherwise wouldn't
15 | be entitled to get and, and, you know, and suppose these were
16 | radio stations at a time when you could only own 14 and it
17 | programmed those two additional stations with an urban format,
18 | hired exclusively Africa-Americans and put on programming that
19 | was responsive to the needs of Africa-Americans in those
20 | communities and all other 12 stations were Country Western
21 | station, but in fact, all of the decisions about that
22 | programming about that programming were made by nonminorities,
23 | or most of the decisions were made by nonminorities. Would
24 | the fact that the ultimate programming differed as it did be
25 | useful in showing that the decisions were not made by the

1 people who actually made them? And the answer is no. The
2 only question is who directed that decisions be made, who did
3 the hiring of the managers who made the decisions, not what
4 the programming decisions are at all, not what the program
5 format is at all, not the race of the people that were hired,
6 but what is the nexus of control and decision making and
7 that's all.

8 JUDGE CHACHKIN: Well, I agree with you, that's the
9 test of whether control was exercised.

10 MR. TOPEL: Your Honor, that testimony is included.
11 These programming decisions are in context of Jane Duff met
12 with the station manager, told him to do this, told him to do
13 that. The fact that he did it is corroborative in case
14 someone wants to question the veracity of her testimony that,
15 that she told him to do that. So, it's, it's relevant in that
16 regard. The other aspect of, of the case is that there is a
17 Commission rule that National Minority is accused of abusing
18 and that Commission rule was set up to fulfill certain
19 purposes. And I think if an applicant came in and had not
20 fulfilled those purposes Mr. Cohen would be taking precisely
21 the opposite position and saying well, this is extremely
22 relevant, there was a rule for this purpose, they did nothing
23 to fulfill that purpose and therefore they abused the
24 Commission process. The other side, the other side of the
25 argument is proper also. If there's a rule to fulfill a

1 purpose and the applicant came in and in good faith fulfilled
2 that purpose, that is probative that they were not intending
3 to abuse the Commission's process.

4 MR. COHEN: Your Honor, that's, that is such a red
5 herring. I mean --

6 JUDGE CHACHKIN: I don't understand the reasoning
7 myself.

8 MR. COHEN: -- it, it, it has nothing to do with the
9 issues in this proceeding. What, what Mr. Topel is trying
10 very hard to do and, and I've known him for more years than I
11 want to admit and he's an excellent lawyer, what he's trying
12 to do is to change these issues and make these issues
13 something other than what the Commission said they were in the
14 designation order.

15 JUDGE CHACHKIN: We have simple case of control here
16 and my decision is based on the Commission's decisions dealing
17 with control and what constitutes control and what doesn't
18 constitute control whether or not --

19 MR. COHEN: Well, I wish we could deal with the
20 specific, specific objections rather than having theoretical
21 discussions, Your Honor.

22 JUDGE CHACHKIN: Well, I think --

23 MR. COHEN: As this unfolds I think it will become
24 more clear.

25 JUDGE CHACHKIN: Well, I think it's important at

1 | this juncture to make clear that there are issue -- there are
2 | cases which deal with what are the elements of control. And
3 | as far as I'm concerned, in determining whether or not control
4 | was exercised or not exercised in violation of 310(b), that
5 | determination will be based on whether or not on examination
6 | as the Commission says in a case-by-case basis as to how --
7 | who exercised these elements of control.

8 | MR. COHEN: And that's what our case is all about,
9 | just that, Your Honor.

10 | JUDGE CHACHKIN: And to the extent which, which you
11 | have evidence which deals with the exercise of control, NMTV,
12 | that's relevant. The extent which you put in evidence here
13 | which doesn't bear on that subject, that's not relevant to the
14 | question of control, nor to -- also to the question of whether
15 | or not you had more stations than you were allotted. And I, I
16 | don't see how the sentence dealing with -- which we're talking
17 | about, the fact that it made a strong commitment to employing,
18 | training and promoting minorities, etc., bears on the question
19 | of who made these decisions. And what I'm saying to you, if
20 | these decisions were made in violation of 310(b), then it
21 | would be irrelevant. The fact that a benevolent white
22 | company, as I put it, made the decisions which fully are
23 | consistent with the Commission's goal in establishing the
24 | policy has no bearing on whether or not 310(b) was -- is --
25 | had been violated or not.

1 MR. TOPEL: Your Honor, I'm glad we had the
2 discussion because I agree with you, but this evidence is, is
3 fully explained that it was Mrs. Duff, a minority, who told
4 Mr. McQuellen to do certain things and the fact that he then
5 went forward and did them tied to her instruction relates to
6 the focus of control.

7 JUDGE CHACHKIN: Well, there's nothing in this
8 sentence that indicates that these decisions were made by Ms.
9 Duff. The decision -- the, the sentence which is being
10 objected to just makes a broad statement about the station's
11 commitment to minorities which would be consistent with what
12 you earlier argued. Namely, notwithstanding there was a
13 310(b) violation, if the Commission's goals were fulfilled,
14 that's fine and good. That's not what the issue is here and I
15 don't think that's the way the Commission feels about --
16 establish the policies with that in mind.

17 MR. TOPEL: Well, Your Honor, I would just --

18 JUDGE CHACHKIN: So, where it's tied in to what the
19 board did, I will permit it. Where statements are made which
20 are not tied in to the actions of the board I will not permit
21 it. This sentence is not tied in to the board action.

22 MR. TOPEL: Well, it is, Your Honor.

23 JUDGE CHACHKIN: It's not tied in to --

24 MR. TOPEL: It says NMTV's board has made a
25 commitment and the board consists of Jane Duff, E.B. Hill --

1 JUDGE CHACHKIN: Well, this, this is all
2 generalities. What I want is facts. I want to know what
3 decision was made by a board, what, what board members
4 participated in it. I can't make findings on general
5 statements or general conclusions. Let's get the facts. Did
6 the board -- who made the decision, when was the decision
7 made, what was the nature of the decision, what steps did the
8 board members see -- that -- see whether it was carried out.
9 If you got evidence of that nature -- this is a trial, after
10 all. I'm not going to write findings on the basis of general
11 statements of, of this nature. Now, I assume you have minutes
12 of meetings of the board which showed who made, made
13 decisions, the nature of the decisions, other facts which,
14 which, which one could make a decision on. Not a general
15 statement that the board has made a strong commitment to, to
16 employing, training and promoting minorities. That has
17 nothing to do with, with the transfer of control issue.

18 MR. TOPEL: Your Honor --

19 JUDGE CHACHKIN: So, I'm going to strike this
20 sentence as irrelevant. Whether it made such a commitment or
21 not is irrelevant. This is your case. You should have been
22 familiar with what the Commission indicated. There is a vast
23 precedent on what you have to establish to show control. This
24 has no bearing on that. You have facts tied in to actions of
25 the board -- on October 5th, 1982, whatever it was, the board